Supreme Court, U.S.
FILED
SEP 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 84-1538

In The

Supreme Court of the United States

October Term, 1985

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL, and BERKELEY RENT STABILIZATION BOARD,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE STATE OF NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE AS AMICUS CURIAE IN SUPPORT OF APPELLEES.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The New Jersey Department of the Public Advocate (Department), an independent and unique cabinet-level agency of New Jersey state government, N.J.S.A. 51:27E-2,[1] has, for almost eleven years, litigated extensively on behalf of New Jersey citizens in major cases affecting "the public interest."[2] During this

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[1] The Department is specifically empowered to "represent the public interest in such administrative and court proceedings....as the Public Advocate deems shall best serve the public interest." N.J.S.A. 52:27E-29. "Public interest" is defined as "an interest arising from the Constitution, decisions of the court, common laws or other laws of the United States or of this state inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. 52:37E-30. See also N.J.S.A. 52:27E-31 (factors to be considered in deciding whether to represent a particular public interest).

[2] The Department provides legal representation in a wide range of "public interest" cases through its Division of Public Interest Advocacy, N.J.S.A. 52:27E-28 to 32. See, e.g., So. Burlington Cty. NAACP v. Tp. of Mt. Laurel, 67 N.J. 151, 336 A.

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period, the Department has participated in a wide variety of proceedings involving issues relating to housing, employment, nuclear power and the rights of the mentally handicapped.[3] The cri-

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(footnoted continued from previous page)
2d 713 (1975), cert. den., 423 U.S. 808 (1975) (Mt. Laurel I) So. Burlington Cty. NAACP v Tp. of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (Mt. Laurel II) (fair share housing); Klein v. Califano, 586 F.2d 250 (3d Cir 1977) (nursing home funding); Overlook Terrace Management Corp. v. Rent Control Bd., 71 N.J. 451, 366 A.2d 321 (1976) (rent control); Van Ness v. Borough of Deal, 78 N.J. 174, 393 A.2d 571 (1978) (applicability of public trust doctirne to beach access).

[3] The Department has filed several amicus curiae briefs on behalf of the interests of New Jersey citizens in matters pending before the Court. See, e.g., Ake v. Oklahoma, ___ U.S. ___, 105 S. Ct. 1087 (1985); United Building Construction and Trades Council of Camden County v. City of Camden, ___ U.S. ___, 104 S. Ct. 1020 (1984); Silkwood v. Kerr McGee Corp., ___ U.S. ___, 104 S. Ct. 615 (1984); Jones v. United States, ___ U.S. ___, 103 S. Ct. 3043 (1983); Pennhurst State School v. Halderman, 451 U.S. 1 (1981) (amicus brief filed by Division of Advocacy for Developmentally Disabled of the Department of the Public Advocate, see N.J.S.A.
(footnote continued on next page)

tically important role of the Department as a representative of the public interest of New Jersey citizens has been frequently acknowledged.[4]

The present case raises the issue of whether a city's rent control ordinance that does not result from specific state enabling legislation conflicts with and is, therefore, preempted by the Sherman Antitrust Act (15 U.S.C. §§1-7).

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52:27E-41.1 to 41.5, along with "protection and advocacy systems," see 42 U.S.C. §6012, of forty-four individual states and territories); Kremens v. Bartley, 431 U.S. 119 (1977); Parham v. J.R., 442 U.S. 584 (1974).

[4] For example, the New Jersey Supreme Court has characterized the Department as a "shining example of that commitment [by the government to the public interest,]" Mt. Laurel Twp. v. Dept. of the Public Advocate, 83 N.J. 522, 535, 416 A.2d 886, 893 (1980), and of "admirably further[ing] the principles embodied in our Constitution," id. at 536, 416 A.2d at 893, as it fulfills the role of "nourishing and revitalizing our political system," id.

The resolution of this case is particularly important for the municipalities and citizens of New Jersey, since no explicit enabling legislation authorizing local governments to promulgate rent control measures has been enacted in this State.[5] Furthermore, over 100 municipalities in New Jersey have rent control ordinances in effect at the present time. The magnitude of the affordable housing crisis

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[5] Appellants incorrectly represent that the New Jersey Legislature has authorized local governments in the State to enact rent controls, citing N.J.S.A. §§2A:42-74 and 42-77. (App. Br. at 41, n. 20). That is simply not the present state of the law in New Jersey. The thrust of these statutes is directed toward authorizing municipalities to control the rents of substandard dwellings. Contrary to the appellants' representation, these statutory provisions have not been construed to establish a general state policy authorizing municipalities in New Jersey to impose rent control measures in other circumstances. Inganamort v. Borough of Fort Lee, 120 N.J. Super. 286, 309-10, 293 A.2d 720, 732-33 (Law Div. 1972), affirmed, 62 N.J. 521, 303 A.2d 298, appeal after remand, 72 N.J. 412, 371 A.2d 34 (1977).

in New Jersey was explicitly described in the Mt. Laurel I decision, So. Burlington Cty. NAACP v. Tp. of Mt. Laurel, 67 N.J., at 158-59, 336 A.2d, at 716-17, and, if anything, has been exacerbated since that time. 92 N.J. at 211-212, 456 A.2d at 416-17.

The Department of the Public Advocate has a lengthy involvement and considerable experience in matters relating to the affordability of housing and the legality of rent controls in New Jersey. For example, the Department has represented citizens of New Jersey in cases establishing the constitutional obligation of the State and municipalities to provide realistic opportunities for low and moderate income housing. See, e.g., Matter of Egg Harbor Associates, 185 N.J. Super. 507, 449 A.2d 1324 (App. Div. 1982), aff'd,

94 N.J. 358, 464 A.2d 1115 (1983) (State); Southern Burlington County N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151, 336 A.2d 713, cert. den. 423 U.S. 808 (1975) (Mt. Laurel I); Southern Burlington County N.A.A.C.P. v. Tp. of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (Mt. Laurel II) (municipalities).

Additionally, the Department has represented New Jersey citizens in support of rent control measures designed to address the housing shortage and the economic reality that the housing market is not functioning in the public interest in this State. See, e.g., AMN, Inc. v. So. Bruns. Tp. Rent Leveling Board, 93 N.J. 518, 461 A.2d 1138 (1983); Property Owners Ass'n. of N. Bergen v. Tp. of N. Bergen, 74 N.J. 327, 378 A.2d 25 (1977); Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543, 350 A.2d 1 (1975).

Vital interests of numerous New Jersey municipalities and their citizens will be directly affected by the decision of this Court on whether local rent control measures are inconsistent with the provisions of the Sherman Antitrust Act.

Consequently, the Department appears as amicus curiae to address the impact upon New Jersey municipalities and, indeed, the entire structure of government in this State if the antitrust standards governing private businesses or cartels are rigidly applied to municipal rent control.

Consent to the filing of amicus curiae briefs has been granted by the parties. A letter to that effect is on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

The New Jersey Legislature has not adopted any explicit statute generally authorizing municipalities to adopt rent controls. Nonetheless, the Supreme Court of New Jersey has held that New Jersey municipalities possess the authority, even without a specific State enabling act, to enact rent control ordinances in response to their clear responsibility to protect the general welfare of their citizens. To date, over 100 municipalities in New Jersey have promulgated rent control ordinances under their police powers.

In enacting these rent control measures, municipalities have been motivated by the existence of an acute housing shortage in this State, the widespread imposition of exorbitant rents ("rent gouging"), and monopoly control of the rental housing market. Municipal

rent control ordinances have emerged as a major tool in local efforts to address the acute shortage of decent and affordable housing that plagues many areas of New Jersey. Such ordinances now play a significant role in determining the quality and affordability of housing in New Jersey.

The ability of New Jersey municipalities to promote the general welfare of their citizens will be crippled if antitrust standards developed in the context of private business activity and private conspiracies are held applicable to municipal rent control ordinances in this State. The adverse effects upon local efforts to address the shortage of decent and affordable housing and upon tenants throughout New Jersey would be direct and immediate. Moreover, such a holding would strike at the heart of the ability

of municipalities in New Jersey to take appropriate steps to protect the best interests of their inhabitants in a wide variety of contexts. Additionally, traditional notions of local government would be radically altered, the federal courts would inevitably become extensively entangled in the day-to-day activities of municipalities, and local officials in the proper exercise of their governmental responsibilities would face the daunting, and in many instances, insurmountable obstacle of seeking specific legislative authorization every time they attempt to remedy a local problem by displacing competition with regulation.

Instead of crippling in this fashion the ability of municipalities in New Jersey and elsewhere to respond to demonstrable housing crises or other serious problems within their

borders -- a result that is neither compelled nor contemplated by Community Communications Company, Inc. v. City of Boulder, Colorado, 455 U.S. 40 (1982) or any other decision -- the Court should uphold the judgment of the Supreme Court of California dismissing the claim that the Berkeley rent control ordinance is, on its face, in conflict with the Sherman Act.

ARGUMENT

THE ANTITRUST PRINCIPLES GOVERNING PRIVATE BUSINESS ACTIVITY SHOULD NOT BE MECHANICALLY APPLIED TO MUNICIPAL RENT CONTROL ORDINANCES DESIGNED TO PROMOTE THE GENERAL WELFARE

In New Jersey, there is no explicit state legislative authorization for local governments to enact general rent control ordinances.[6] Notwithstanding the absence of a state enabling act, New Jersey's municipalities possess the authority under their police powers to adopt rent control measures "to deal with the evil of inordinate rent arising out of a housing shortage." Inganamort v. Fort Lee, 62 N.J. 521, 527, 303 A.2d 298, 301 (1973).[7]

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[6] The appellants' assumptions to the contrary about New Jersey law are clearly wrong. (supra at n. 5).

[7] In upholding the rent control ordinances at issue in Inganamort, the New Jersey Supreme (footnote continued on next page)

Presently, over 100 municipalities in this State, or roughly one fifth of all New Jersey municipalities, have enacted rent control ordinances.[8] Such ordinances represent a local

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Court recognized that rent control was clearly a proper subject for local government:

> There is no inevitable need for a single statewide prohibition or for a single statewide enforcing authority. On the contrary, it may be useful to permit municipalities to act, for, being nearer to the scene, they are more likely to detect the practice and may be better situated to devise an approach to their special problems. Inganamort v. Fort Lee, 62 N.J., at 529, 303 A.2d, at 302 (quoting Summer v. Teaneck, 53 N.J. 548, 553, 251 A.2d 761, 764 (1969).

8 Rent Control Survey of New Jersey Municipalities (July 1985) prepared by the Office of Landlord and Tenant Information, Division of Housing and Development, State of New Jersey Department of Community Affairs. See also Barr, "Guidelines for Drafting Rent Control Laws: Lessons of A Decade," 33 Rutgers L. Rev. 723, 725 n. 1 (1983).

response by the municipality to the general welfare of its inhabitants. The rationales for these ordinances include the existence of an acute housing shortage, the widespread imposition of exorbitant rents ("rent gouging"), and monopoly control of the rental housing market. Brunetti v. Borough of New Milford, 68 N.J. 576, 594, 350 A.2d 19, 28 (1975).[9] See also, Barr, supra, 35 Rutgers L. Rev. 726. Indeed, the "desperate need for housing, especially of decent living accommodations economically suitable for low and moderate income families" has long been recognized in

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[9] For background information on the development of municipal rent control in New Jersey as a means of addressing the "exploitation of a housing shortage" in the State, Inganamort v. Fort Lee, 62 N.J., at 531, 303 A.2d at 303, see generally Barr, "Rent Control In The 1970's: The Case of the New Jersey Tenants' Movement," 28 Hastings L.J. 631 (1977).

New Jersey. So. Burlington County NAACP v. Tp. of Mt. Laurel, 67 N.J., at 158-60, 336 A.2d., at 716-17; Mt. Laurel II, 92 N.J. at 211-212, 456 A.2d 416-17.

Regardless of the reasons for their enactment, however, the benefical impact of rent control upon the general welfare and public interest of New Jersey citizens has been evident. Rent control in this State has emerged as an important tool to address the shortage of decent and affordable housing that has chronically plauged portions of New Jersey -- a shortage most recently decried in So. Burlington Cty. NAACP v. Mt. Laurel Tp., 92 N.J., at 212 n. 6, 456 A.2d, at 417 n.6. Rent control ordinances have been variously characterized as a means "to assure fairness in the landlord-tenant relationship," Harry's Village, Inc. v. Egg Harbor Tp., 89 N.J.

576, 584, 446 A.2d 862, 866 (1982); "to regulate the forces of the marketplace to help [the municipality's] residents obtain decent housing within their means," Orange Taxpayers Council, Inc. v. Orange, 83 N.J. 246, 257, 416 A.2d 353, 359 (1980); and to address the fact that "the free housing market was not functioning in the public interest." Hutton Pk. Gardens v. West Orange Council, 68 N.J. 543, 564, 350 A.2d 1, 12 (1975). In short, rent control is one of the most significant weapons in the arsenal available to New Jersey's municipalities to cope with a severe housing shortage and with pressing local problems affecting the general welfare of their citizens.

The adoption of appellants' position, urging the unprecedented application of anti-trust principles fashioned in the context of

private business activity to municipal regulations designed to promote the public welfare, would have a widespread and devastating impact on New Jersey's municipalities and citizens. The ability of municipalities in a state like New Jersey -- one that is partly urban, partly suburban and partly rural -- to promote the welfare of their citizens would be radically eroded by any of the following developments. Yet, all of these directly flow from the approach to the Sherman Act urged by appellants.

First, the capacity of municipalities to respond to the diversity of local problems would be crippled if their legitimate regulatory activities for the public welfare are equated under antitrust laws with the actions or agreements of private cartels. As the California Supreme Court correctly ob-

served, municipalities are unlike a private business: the latter is motivated by a quest for greater profit while a municipality is "generally motivated by the purpose of furthering local health, safety or welfare." Fisher v. City of Berkeley, 693 P.2d 261, 278 (Cal. 1984). Because tne principles of antitrust law are fashioned for regulating private business, such standards cannot be mechanically applied to local regulatory actions serving legitimate governmental objectives. The Court itself has recognized that "certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by local government." Community Communications Company v. City of Boulder, 455 U.S. 40, 56 n. 20 (1982), citing City of Lafayette v.

Louisiana Power and Light Company, 435 U.S. 389, 417 n. 48 (1978).

Furthermore, this Court has also reiterated the fundamental distinction between private parties and municipalities:

> We may presume, absent a showing to the contrary, that the municipality acts in the public interest [footnote omitted]. A private party, on the other hand, may be presumed to be acting primarily in his or its own behalf."

Town of Hallie v. City of Eau Claire, ____ U.S. ____ , 105 S. Ct. 1713, 1720 (1985). Consequently, appellants' simplisitic attempt to equate a municipal regulatory regime with the private market would strike a severe, if not fatal, blow at the ability of municipalities to take appropriate steps to protect the general welfare, and would do so without providing any principled analysis of the important differences between municipal actions

and private business activity.

Second, the effect of treating a municipality's regulatory decisions as conspiracies under antitrust laws would be equally destructive. A municipality would be effectively disabled from performing its lawful responsibilities as a democratically elected local unit of government if its displacement of competition with regulation for the public welfare were construed as a vertical conspiracy, in violation of the Sherman Act, between the municipality and those regulated or those who were successful in securing the regulatory action. It clearly would be a legally unprecedented step to apply antitrust principles to those individuals who persuade a local governing body to act or who are victorious in local initiative or referenda. Eastern Railroad Presidents

Conference v. Noerr Motor Freight, 365 U.S. 127, 136 (1961). On the other hand, it would place a straitjacket upon the municipality if the Sherman Act treated as a conspiracy the compulsion of private parties by local government under lawfully enacted municipal regulations. Any regulation of competition in the municipality, such as laws concerning licensing, the regulation of tradesmen, or taxicab charges, would be immediately suspect under the federal antitrust law, however legitimately motivated, and "a municipality's power to regulate the economy would be all but destroyed." Community Communications Co. v. City of Boulder, Colo., 455 U.S., at 67 (Rehnquist, J., dissenting).

Third, municipal governments would be totally disrupted if they were denied the opportunity to present a potent public welfare

defense in the event that the merits of an antitrust action are reached. To limit a municipality's defense of an ordinance solely to the effects on competition, and to divest the local government of the general welfare defense, would wholly eviscerate the municipality's ability to exercise its lawful police powers. The consequences of such an approach are completely illogical. Although the public welfare and the best interests of a municipality's inhabitants are the motives behind municipal action, Fisher v. City of Berkeley, 693 P.2d, at 278, these issues would be deemed wholly irrelevant to an antitrust defense.

The California Supreme Court's decision quite properly avoids this disastrous result by recognizing that "[a]nticompetitive conduct by a municipality in exercise of its legitimate police

power is indeed of a 'different complexion' than similar conduct engaged in by private enterprises" and that "courts must adopt or modify the application of traditional antitrust rules when reviewing the acts of municipal defendants." Id. at 277. Consequently, the appellants' position in this Court, which seek the mechanical application to municipalities of rules of law fashioned in the context of private business regulation, should be rejected as an unrealistic and inflexible approach to the legitimate governmental objectives that underlie municipal regulation.

Fourth, the inevitable consequence of appellants' approach to antitrust law would be a dramatic expansion of the involvement of federal judges in the affairs of local government. Indeed, appellants' position can only lead to the hopeless and excessive

entanglement of federal courts in the day-to-day operations of a municipality. The demands on local officials who are confronting the realities of the pressing problems of their communities, including the critical housing shortage in New Jersey, are overwhelming enough without judges scrutinizing every regulatory action to ensure its consistency with the procompetitive policies of the Sherman Act. Not only would this have a substantial detrimental impact upon the local autonomy of municipalities and their authority to govern themselves, City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 434-35 (1978) (Stewart, J., dissenting), but also it would be undesirable, since such a close appraisal of the justifications for municipal regulatory activities would "embroil the federal courts in. . .

unnecessary interpretation." Town of Hallie v. City of Eau Claire, ____ U.S. ___ , 105 S. Ct. 1713, 1719 n. 7 (1985).

Fifth, municipalities in New Jersey would be completely hamstrung if they were forced to seek specific legislative authorization every-time they were faced with a local housing or economic problem that required municipal regulation. The reality in a State like New Jersey is that the Legislature is part-time, has many other concerns and must be largely responsible to a suburban constituency.[10] Indeed, as the New Jersey Supreme Court observed:

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[10] The New Jersey Supreme Court has carefully documented the "great movement of commerce, industry and people out of the inner cities and into the suburbs." So. Burlington Cty. NAACP v. Mt. Laurel Tp., 92 N.J., at 210 n. 5, 456 A.2d, at 415 n. 5. Thus, the suburban and rural constituency in this State has greatly expanded while there has been a corresponding decline in the population, and legislative influence, of urban areas.

> It is well to keep in mind that our legislators are elected from districts rather than at large. This is a source of strength, but it holds the weakness that a localized problem is less apt than a general one to invite prompt action at the State level.

Inganamort v. Borough of Fort Lee, 62 N.J., at 533, 303 A.2d at 304. For these reasons, the state Supreme Court has emphasized the need to ensure that "local government be equiped to deal with matters of local concern which, if left to state action, might not be met expeditiously or at all." Id. Forcing municipalities to go to the legislature to obtain specific authorization for every regulatory action with possible anti-competitive consequences would not only pose an insurmountable burden, but also would have detrimental effects upon

the municipality's local autonomy. Cf. Town of Hallie v. City of Eau Claire, ___ U.S. ___, 105 S. Ct. at 1719.

If anything, the experience in New Jersey has been that while the state legislature leave power in the hands of the cities to act in order to foster safe, decent and affordable housing, it is ordinarily unwilling to provide specific grants of authority. See e.g., Dome Realty v. Paterson, 83 N.J. 211, 230, 416 A.2d 334 (1980) (municipal ordinance conditioning grant of certificates of occupancy in rental housing in compliance with housing codes); Inganamort v. Fort Lee, 62 N.J. 521, 303 A.2d 298 (municipal rent control); N.J. Builders' Assocation v. Mayor of East Brunswick, 60 N.J. 222, 287 A.2d 725 (1972) (municipal regulation of building

contractors); Summer v. Teaneck Township, 53 N.J. 548, 251 A.2d 761 (1969) (municipal antiblockbusting ordinance); Sunrise Village Associates v. Borough of Roselle Park, 181 N.J. Super. 565 (App. Div. 1981) (municipal ordinance requiring security measures in apartment buildings); Apartment House Council v. Mayor of Ridgefield, 123 N.J. Super. 87 (Law Div. 1973), aff'd., 128 N.J. Super. 192 (App. Div. 1973) (municipal ordinance requiring security deposits by landlords).

This approach is particularly evident where the obligations and burdens imposed upon the municipality are created by the state court's interpretation of the State's own constitution, and the legislature has still failed to act. So. Burlington Cty. NAAPC v. Tp. of Mt. Laurel, 92 N.J.,

at 212, 456 A.2d, at 417. (Legislature has failed for eight years to act on Court's 1975 decree establishing the obligation of municipalities to provide opportunities for low and moderate income housing). In these circumstances, the requirement of express authorization for every municipal regulatory action would signify a disrespect on the part of federal courts for the separate and distinct obligations imposed on municipalities by state constitutions. Cf. Pruneyard Shopping Center v. Robins, 477 U.S. 74, 81 (1980). See also, Brennan, "State Constitution and the Protection of Individual Rights," 90 Harv. L. Rev. 489 (1977).

The above five factors provide powerful and compelling reasons why antitrust standards governing private business

activity should not be mechanically applied to municipal rent control ordinances designed to promote the public welfare.

In closing, amicus curiae must emphasize that upholding the judgment below will not result in a blanket exemption for municipalities from the antitrust laws. This Court has already held that cities, unlike states, may not exempt themselves from the provisions of the Sherman Antitrust Act. Community Communications Company v. City of Boulder, 455 U.S. 40 (1982). However, in rejecting the use by cities of the "state action" exemption as a shield from federal antitrust policy, the Court certainly did not intend, and nothing in Boulder provides, that the Sherman Antitrust Act was converted into a sword to strike down every municipal rent control ordinance or other

legitimate governmental regulation promulgated without a specific state enabling statute. Indeed, appellants' efforts to transform Boulder into an automatic federal veto of the legitimate exercise of local authority in response to the public welfare is fundamentally at odds with this Court's express admonition that "certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." Boulder, 455 U.S., at 57 n. 20 (quoting City of Lafayette v. Louisiana Power and Light Co., 435 U.S., at 417 n. 48.

CONCLUSION

For the reasons stated above, amicus curiae, the State of New Jersey Department of the Public Advocate respectfully submits that the judgment of the Supreme Court of California should be affirmed.

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